88-777

No.____

Supreme Court, U.S.
FILED
NOV 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

GUANGZHOU MARITIME
TRANSPORT BUREAU OF CHINA,
Petitioner

v.

HUGHES DRILLING FLUIDS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES H. ROUSSEL*
MARGOT MAZEAU
PHELPS, DUNBAR, MARKS,
CLAVERIE & SIMS
Thirtieth Floor,
Texaco Center
400 Poydras Street
New Orleans, LA 70130
Telephone: (504) 566-1311

Attorneys for Petitioner

November 7, 1988

*Counsel of Record

QUESTIONS PRESENTED

1. Whether a forum selection clause in a foreign carrier's bill of lading subject to the Carriage of Goods by Sea Act is invalid *per se* if it specifies a non-U.S. forum for litigation or arbitration?

2. Whether a forum selection clause is enforceable in a dispute limited to general average?

LIST OF PARTIES

The Petitioner, Guangzhou Maritime Transport Bureau of China, is the owner of the vessel LUO FU SHAN.

The Respondent, Hughes Drilling Fluids, is the owner of cargo of drilling barite shipped aboard the vessel.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
List of Parties	ii
Opinions Below	2
Jurisdiction	2
Constitutional Provision	2
Statute Involved	2
Statement of The Case	4
Reasons for Granting The Writ	6
1. The Decision of the Court of Appeals, Holding a Forum Selection Clause Requiring Litigation or Arbitration of a General Average Dispute in a Non-U.S. Forum to be Invalid *per se*, is Contrary to 46 U.S.C. §1303(8) And Violates The Basic Tenets of *M/S BREMEN v. Zapata Offshore Company*, 407 U.S. 1 (1972).	6
2. The Forum Selection Clause is a Lawful Provision Regarding General Average Within The Meaning of 46 U.S.C. §1305.	12
Conclusion	13
Appendix A (Opinion And Judgment of Court of Appeals)	1a
Appendix B (Memorandum Decision of District Court)	6a

TABLE OF AUTHORITIES

PAGE

CONSTITUTIONAL PROVISION:
Article III, §2 2

STATUTES:

46 U.S.C. §§1301-1315 (1982) 2, 6

46 U.S.C. §1303(8) 2, 9, 10, 12

46 U.S.C. App. §1305 . . . . . 3, 12

CASES:

Aetna Insurance Co. v. The SATRUSTEGUI, 171 F. Supp. 33, *vacated other grounds*, 174 F.Supp. 934 (D.P.R. 1959) 7, 10

M/S BREMEN v. Zapata Off-Shore Co., 407 U.S. 1 (1972) 6, 8, 9, 10, 13

Carbon Black Export, Inc. v. The MONROSA, 254 F.2d 297 (5th Cir. 1958), *cert. dismissed*, 359 U.S. 180 (1959) . . . 6, 7

Conklin & Garrett, Ltd. v. M/V FINNROSE, 826 F.2d 1441 (5th Cir. 1987) 7, 8

Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) 10

Hughes Drilling Fluids v. M/V LUO FU SHAN, 852 F.2d 840 (5th Cir. 1988). . . . 2, 7

In Re Air Crash Disaster Near New Orleans, 821 F.2d 1147 (5th Cir. *en banc* 1987) 10

TABLE OF AUTHORITIES--Continued

PAGE

Indussa Corp. v. S/S RANBORG, 377 F.2d 200 (2d Cir. 1967) 7, 8

Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) 10

Schuster Naval Stores Co. v. Ozean/Stinnes Lines, 1962 A.M.C. 999 (S.D. Ga. 1961) . . 7, 10

State Establishment for Agricultural Product Trading v. M/V WESERMUNDE, 838 F.2d 1576 (11th Cir. 1988), *cert. denied* 57 U.S.L.W. 3277 (U.S. Oct. 18, 1988). . . 7

The Star of Hope, 76 U.S. (9 Wall.) 203 (1869). 13

Union Insurance Society of Canton, Ltd. v. S/S ELIKON, 642 F.2d 721 (4th Cir. 1981) . 7, 8

OTHER AUTHORITIES:

G. Gilmore & C. Black, *The Law of Admiralty*, 268 (2d ed. 1975) 12

S. Rep. No. 742, 74th Congress, lst Sess. (1935), Hearings Before The Senate Commerce Committee on S.1152, a bill relating to Carriage of Goods by Sea, 74th Cong. lst Sess. 1935, p. 3. 12

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

No.____

GUANGZHOU MARITIME
TRANSPORT BUREAU OF CHINA,
Petitioner

v.

HUGHES DRILLING FLUIDS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Guangzhou Maritime Transport Bureau of China respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled proceeding on August 22, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix "A") is reported at 852 F.2d 840 (5th Cir. 1988). The District Court's Memorandum Opinion and Order (Appendix "B") is reported at 1988 A.M.C. 82 (E.D.La. 1987).

JURISDICTION

The Judgment of the Court of Appeals was entered on August 22, 1988, *infra*. No petition for rehearing or rehearing *en banc* was sought. This petition is sought within 90 days of judgment pursuant to 28 U.S.C. 2101(c).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

Article III, §2 of the United States Constitution provides:

> The judicial power shall extend ... to all cases of admiralty and maritime jurisdiction.

STATUTE INVOLVED

46 U.S.C. §§1301-1315.Carriage of Goods by Sea Act.

46 U.S.C. §1303(8). Limitation of liability for negligence:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or

> the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or a similar clause, shall be deemed to be a clause relieving the carrier from liability.

46 U.S.C. §1305. Surrender of right; increase of liability; charter party; general average.

> A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under the chapter, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.
>
> The provisions of this chapter shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this chapter. Nothing in this chapter shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

STATEMENT OF THE CASE

Although its cargo was delivered undamaged, respondent, Hughes Drilling Fluids, filed (1) an *In Personam* Complaint, alleging "anticipated" damage to a cargo of barite ore carried aboard the M/V LUO FU SHAN, a Chinese flag vessel owned by petitioner, an agency of the Chinese Government; and (2) an action for declaratory judgment, based on alleged diversity jurisdiction, seeking to be exonerated from contribution in general average.

The cargo of barite ore was loaded aboard petitioner's vessel at Zhanjing, People's Republic of China, and was purchased by respondent while the vessel was in transit from China to the United States. Two clean onboard bills of lading were issued to respondent. Both of them contained the forum selection clause and a local clause, making them subject to COGSA.[1]

On her voyage to the United States Gulf, the M/V LUO FU SHAN encountered heavy seas and sustained damage which necessitated a deviation to Guam for temporary repairs and subsequent return to China for permanent repairs. Petitioner declared general average and appointed the China Council for the Promotion of International Trade as Average Adjusters pursuant to Clause 24(1) in the bills of lading:

> (1) General Average shall be adjusted in Beijing in accordance with China Council for Promotion

---

1 Clause 27. Local Clause.

With respect to the goods carried to or from the United States of America, notwithstanding any other term hereof this Bill of Lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States of America, 1936. . . .

of International Trade Provisional Rules for General Average Adjustment, 1975.

Respondent posted a Lloyd's Average Bond, and petitioner transshipped the cargo to New Orleans aboard another vessel. The cargo arrived undamaged, and respondent subsequently abandoned its admiralty claim for "anticipated" cargo damage.

Petitioner filed an answer to respondent's diversity action in which it denied jurisdiction over its person. Thereafter, and without waiving its objections to *in personam* jurisdiction, petitioner brought a Motion to Dismiss, asserting, *inter alia*, that the general average dispute should be determined by arbitration in the People's Republic of China pursuant to the forum selection clause[2] in the bill of lading, and, alternatively, that respondent's declaratory judgment action should be dismissed on the basis of *forum non conveniens*.

The District Court granted petitioner's Motion to Dismiss on June 17, 1987, holding that the forum selection clauses contained in the bills of lading were valid and enforceable. The Court did not reach the issues of personal jurisdiction[3] or *forum non conveniens*. Respondent appealed to the Fifth Circuit Court of Appeals on August 12, 1987.

---

2 Clause 2. Jurisdiction
All disputes arising or in connection with this Bill of Lading shall be determined by Chinese law in the Court of, or by arbitration in, the People's Republic of China.

3 Although this issue has not been decided and petitioner continues to contest personal jurisdiction, petitioner must seek redress from the Fifth Circuit decision now or be faced with *res judicata* on the issue of the reasonableness of the forum selection clause.

In January, 1988, petitioner commenced arbitration proceedings in China to which respondent objected and in which it refused to participate. On March 18, 1988, respondent filed a Motion to Stay the Trial Court's judgment and to enjoin arbitration proceedings. The motion was granted without written reasons by the trial court on March 29, 1988. Petitioner's appeal to the Fifth Circuit to vacate or suspend the injunction was likewise denied without written reasons on May 13, 1988.

On August 22, 1988, the Fifth Circuit Court of Appeals reversed the trial court's judgment holding that forum selection clauses in bills of lading subject to the Carriage of Goods by Sea Act (COGSA)[4] are invalid not only in cargo damage cases, but also in cases limited to general average disputes.

REASONS FOR GRANTING THE WRIT

1.

The Decision of The Court of Appeals, Holding a Forum Selection Clause Requiring Litigation or Arbitration of a General Average Dispute in a Non-U.S. Forum to be Invalid *per se*, is Contrary to 46 U.S.C. §1303(8) And Violates The Basic Tenets of *M/S BREMEN v. Zapata Offshore Company*, 407 U.S. 1 (1972).

The validity of forum selection clauses as related to *in personam* actions was argued before this Court in the *S/S MONROSA v. Carbon Black Export*,

---

4 46 U.S.C. §§1301-1315 (1982).

359 U.S. 180 (1959), almost thirty years ago. Four of the justices, in dissenting from the decision, expressed concern that the majority's failure to address the issue would serve only:

> "to leave the lower federal courts in confusion and uncertainty and to make it necessary for us to mortgage our future and constantly mounting calendars with a question which we could and should decide today." *Id.* at 727.

Their concern proved to be correct. At present, there is utter confusion as to whether forum selection clauses requiring litigation or arbitration in a non-U.S. forum are (1) invalid *per se*,[5] (2) invalid only if unreasonable,[6] or (3) presumptively valid if limited to arbitration as opposed to adjudication.[7] This confusion is compounded by the fact that the very courts which hold forum selection clauses to be invalid *per se*, permit a dismissal or transfer of the case to a non-U.S.

---

5 *Hughes Drilling Fluids v. M/V LUO FU SHAN*, 852 F.2d 840 (5th Cir. 1988); *Conklin & Garrett, Ltd. v. M/V FINNROSE*, 826 F.2d 1441 (5th Cir. 1987); *Union Insurance Society of Canton, Ltd. v. S/S ELIKON*, 642 F.2d 721 (4th Cir. 1981); *Indussa Corp. v. S/S RANBORG*, 377 F.2d 200 (2d Cir. 1967); *Carbon Black Export, Inc. v. The MONROSA*, 254 F.2d 297 (5th Cir. 1958), *cert. dismissed*, 359 U.S. 180 (1959).

6 Decisions from the district courts of the First and Eleventh Circuits have directly addressed the issue, although the Courts of Appeals have not. *Aetna Insurance Co. v. The SATRUSTEGUI*, 171 F. Supp. 33, *vacated other grounds*, 174 F.Supp. 934 (D.P.R. 1959); *Schuster Naval Stores Co. v. Ozean/Stinnes Lines*, 1962 A.M.C. 999 (S.D. Ga. 1961).

7 *State Establishment for Agricultural Product Trading v. M/V WESERMUNDE*, 838 F.2d 1576 (11th Cir. 1988), *cert. denied* 57 U.S.L.W. 3277 (U.S. Oct. 18, 1988).

tribunal on grounds of *forum non conveniens*.[8] The Fifth Circuit is among those courts which have adopted this inconsistent approach.[9]

The forum selection clause in the instant case was invalidated based upon the premise that litigation or arbitration of a general average dispute in China necessarily "tend[ed] to lessen the carrier's liability" and was, therefore, "unlawful" under COGSA. The premise relied on by the Fifth Circuit was thoroughly discredited by this Court in *M/S BREMEN v. Zapata Offshore* Co., 407 U.S. 1 (1972), when it held that:

> "the argument that [forum selection clauses] are improper because they tend to 'oust' a court of jurisdiction is hardly more than a vestigal legal fiction. It appears to rest at core on historical resistance to any attempt to reduce the power and business of a particular court and has little place in an era when all courts are overloaded and when businesses, once essentially local, now operate in world markets. It reflects something of a provincial attitude regarding the fairness of other tribunals. . . . In light of present-day commercial realities and expanding international trade we

---

8 *Union Insurance Society of Canton, Ltd. v. S/S ELIKON*, 642 F.2d 721 (4th Cir. 1981); *Indussa Corp. v. S/S RANBORG*, 377 F.2d 200 (2d Cir. 1967).

9 *Conklin & Garrett, Ltd. v. M/V FINNROSE*, 826 F.2d 1441 (5th Cir. 1987).

> conclude that the forum clause should control absent a strong showing that it be set aside." *BREMEN*, 407 U.S. at 12, 15.

Although the *BREMEN* case did not involve a COGSA bill of lading or general average dispute, its rationale, i.e., that forum selection clauses in the area of international trade are presumptively valid unless shown to be unreasonable, is equally applicable to this controversy.

The Fifth Circuit's decision reflects the "provincial attitude regarding the fairness of other tribunals," decried in the *BREMEN* case, and is contrary to the explicit language and legislative history of COGSA. The pertinent part of 46 U.S.C. §1303(8) provides that:

> "Any clause, covenant, or agreement in a contract or carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or *lessening such liability* otherwise than as provided in this chapter, shall be null and void and of no effect." (Emphasis supplied).

This case involves neither "loss or damage to . . . goods" nor a "carrier's liability". Rather, it involves the liability of respondent, the owner of the cargo, to contribute to the general average expenditures made for the benefit of its cargo. Consequently, since 46 U.S.C. §1303(8) by its very language is not even

applicable to this general average dispute, obviously it affords no basis for invalidating the forum selection clause.

Even if it were applicable, the test to be applied under §1303(8) is whether the clause lessens the carrier's liability, not whether it "tends" to lessen it, as was held by the Fifth Circuit. Thus, 46 U.S.C. §1303(8) requires an analysis as to whether any given clause does, in fact, "lessen the carrier's liability", which analysis is not satisfied by reverting to the outdated cliche' that dispute resolution in the foreign carrier's forum would inevitably "tend" to lessen the carrier's liability.

The analysis required under §1303(8)[10] is the identical analysis required to determine dismissal or transfer under *forum non conveniens*.[11] Whether the facts in the instant case are analyzed under *BREMEN*, 46 U.S.C. §1303(8) or under *forum non conveniens*, the result should be the same, namely, that arbitration in China is reasonable in that it is the most convenient forum because:

(1) The LUO FU SHAN is owned by an arm of the Chinese government and its operations are directed from Guangzhou. The records of the company relating to the vessel and its cargo are located in China;

(2) The vessel's crew is Chinese, all of whom reside in China;

---

10 *Aetna Insurance Co. v. The SATRUSTEGUI, supra*; *Schuster Naval Stores Co. v. Ocean/Stinnes Lines, supra.*

11 *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *In Re Air Crash Disaster Near New Orleans*, 821 F.2d 1147 (5th Cir. *en banc* 1987).

(3) The LUO FU SHAN has never come to the Eastern District of Louisiana since the incident in question;

(4) All permanent repairs were made in China, including surveys prior thereto. Thus, all the evidence regarding surveys and repairs made before the voyage and following its return from Guam are in China;

(5) Petitioner has the burden of showing it used due diligence to make the LUO FU SHAN seaworthy when the cargo was loaded in China. All the testimony in connection with petitioner's efforts will come from the vessel's crew in China, its records in China and its Chinese surveyors;

(6) General average was declared in China and the general average adjustment prepared in China. Accordingly, all documentation in connection with the adjustment is in China. To require petitioner to adjudicate respondent's liability for contribution to general average in an American court, thousands of miles from the source of all evidence necessary to the case, would not only be unreasonable, but also unfair considering that the general average expenditures resulted from petitioner's successful actions in saving respondent's cargo and delivering it in undamaged condition.

Not only is the Fifth Circuit's decision contrary to the express language of COGSA, it also ignores its legislative history. When considering the bill which resulted in the passage of COGSA, Congress sought to achieve substantial uniformity with similar acts of other major maritime nations. In fact, the acts of other countries were scrutinized so closely that even

clerical errors were corrected.[12] Only the Australian and Canadian acts had provisions at that time invalidating forum selection clauses. Canada was in the process of repealing that provision and subsequently did so. Consequently, it stands to reason that Congress, had it intended to outlaw forum selection clauses, would have done so by incorporating a specific provision invalidating agreements to adjudicate claims in courts outside the United States.

In sum, neither 46 U.S.C. 1303(8) nor the legislative history of COGSA support the Fifth Circuit's decision to mandate adjudication of this general average dispute in a U.S. Court.

2.

The Forum Selection Clause is a Lawful Provision Regarding General Average Within the Meaning of 46 U.S.C. §1305.

Section 5 of COGSA specifically provides that "[n]othing in this Act shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average." The general average provision in the bills of lading issued by petitioner contain the presently used New Jason clause, which is considered to be a "lawful provision" within the meaning of Section 5. *See* G. Gilmore & C. Black, *The Law of Admiralty*, 268 (2d ed. 1975).

---

12 *See* S. Rep. No. 742, 74th Congress, 1st Sess. (1935), Hearings Before The Senate Commerce Committee on S.1152, a bill relating to Carriage of Goods by Sea, 74th Cong. 1st Sess. 1935. p. 3.

There is no authority in COGSA or otherwise supporting the Fifth Circuit's decision that a clause permitting arbitration of a general average dispute in a non-U.S. forum is not "lawful". The court's decision was based squarely on the untenable premise that only a U.S. court can mete out justice in a dispute limited to general average, an ancient maritime doctrine providing for the proportionate sharing between vessel owner and cargo owners of the vessel's expenditures to save cargo. *The Star of Hope*, 76 U.S. (9 Wall.) 203 (1869).

The invalidation of the forum selection clause without any inquiry as to whether it was "reasonable" or "lawful" or did, in fact, "lessen the carrier's liability" is contrary to the dictates of *BREMEN* and COGSA and reflects an unseemly bias against foreign carriers involved in international commercial disputes with U.S. shippers, a bias soundly rejected by this Court: "We cannot have our trade and commerce in world markets and international waters exclusively on our terms, governed by our law, and resolved in our courts." *BREMEN* at 9.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JAMES H. ROUSSEL
MARGOT MAZEAU
PHELPS, DUNBAR, MARKS,
CLAVERIE & SIMS
Thirtieth Floor
Texaco Center
400 Poydras Street
New Orleans, Louisiana 70130
Telephone: (504) 566-1311

Attorneys for Petitioner

APPENDICES

APPENDIX A

HUGHES DRILLING FLUIDS,
Plaintiff-Appellant,

v.

M/V LUO FU SHAN, its engines, tackle, apparel, etc., et al.
Defendants-Appellees.

No. 87-3607.

United States Court of Appeals,
Fifth Circuit.

Aug. 22, 1988.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before THORNBERRY, WILLIAMS, and DAVIS, Circuit Judges:

W. EUGENE DAVIS, Circuit Judge:

Hughes Drilling Fluids (Hughes), the owner of cargo aboard the defendant's vessel, appeals the dismissal of its suit for declaratory judgment seeking a declaration of its general average obligation. The district court concluded that the forum selected in the bill of lading, the Republic of China, was binding on the parties and dismissed the suit. We conclude that the forum selection clause conflicts with the Carriage of Goods by Sea Act (COGSA) and reverse.

I.

The motor vessel LUO FU SHAN owned by defendant-appellee, Guangzhou Maritime Transport Bureau of China (Guangzhou), was damaged in a storm and her cargo contaminated while on a voyage from the vessel's home port, Zhanjiang, People's Republic of China, to the United States. Before the casualty, Hughes purchased from Guangzhou a portion of the LUO FU SHAN's cargo of bulk barite and received bills of lading covering the barite it purchased.

Following the casualty, the vessel diverted to Guam for temporary repairs and then returned to Zhanjiang for permanent repairs. Guangzhou later declared general average, which was submitted to a Chinese agency for arbitration. That agency assessed Hughes' contribution at $452,200.75. Hughes posted a bond to cover its possible obligations under the general average assessment and shipped its barite on another vessel.

Before the Chinese agency assessed Hughes' general average contribution, Hughes had filed this suit in the Eastern District of Louisiana against Guangzhou and the LUO FU SHAN. At the time the action was filed, Hughes sought damages for the cargo contamination it understood had occurred and also sought a declaratory judgment that it owed no general average contribution because the LUO FU SHAN was unseaworthy. When the barite arrived in New Orleans, however, Hughes discovered that the cargo was undamaged. Consequently, Hughes dismissed its claim for cargo damage but continued to assert its declaratory judgment action. In reponse to a motion by appellee, the district court dismissed Hughes' declaratory judgment action for lack of jurisdiction. The court found enforceable the clause of the bill of lading that specified the People's Republic of China as the forum for any dispute that arose over the shipment.

In this appeal Hughes contends, as it did in the district court, that the forum selection clause is unenforceable because it lessens the carrier's liability to the cargo owner in violation of the Carriage of Goods by Sea Act (COGSA).

II.

The question presented in this case is whether a clause in a bill of lading choosing the carrier's home forum conflicts with COGSA when a dispute arises between the carrier and the cargo owner over general average.

The district court concluded that *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972) required it to give effect to the forum selected by the parties in the bill of lading.

In *Bremen*, a German corporation contracted to tow a drilling rig from Venice, Louisiana, to a point off Ravenna, Italy, in the Adriatic Sea. The contract was freely negotiated in an arms length transaction. The forum selected, England, was a compromise, neutral forum rather than the home of one of the parties. Perhaps most important, the Supreme Court carefully noted that COGSA was not applicable to the case. 407 U.S. at 10, n.11, 92 S.Ct. at 1913 n.11.

In *Conklin & Garrett, Ltd. v. M/V Finnrose*, 826 F.2d 1441 (5th Cir. 1987) we considered whether *Bremen* required enforcement of a forum selection clause in a cargo damage case. The owner of cargo damaged during shipment from the United Kingdom to Port Everglades, Florida, on the FINNROSE sued to recover for that damage. The bill of lading under which the cargo was shipped contained a forum selection clause that required any dispute arising under the bill to be decided in Finland according to Finnish

law. After a thorough review of the authorities, we found it entirely unrealistic to believe that no reduction in the carrier's liability occurred if the cargo owner were required to sue the carrier for damaged cargo in a foreign forum. Because COGSA does not permit the parties to contract out of its terms if such a contract diminishes the shipowner's liability, we concluded that the shipowner could not enforce the forum selection clause. We held that *Bremen* "'controls the field of admiralty to the extent that no federal legislation to the contrary is on the books.' We hold that in this case COGSA is applicable and controlling." *M/V FINNROSE*, 826 F.2d at 1442 (quoting Nadelman, Choice-of-Court Clauses in the United States, 21 Am.J. Comp.L. 124, 134 (1973)).

If, in the present case, the dispute between Hughes and Guangzhou related to cargo damage rather than general average *FINNROSE* would be indistinguishable and we would not enforce the forum selection clause. Guangzhou does not seriously dispute this conclusion. It argues, however, that Hughes' action for a declaratory judgment seeking a declaration of Hughes' obligation for general average requires a different result.

The question for decision therefore narrows to whether we should reach a conclusion in this case contrary to the one we reached in *FINNROSE* because the controversy relates to general average rather than cargo damage. The answer depends upon whether COGSA applies to a controversy over general average. If it does, our reasoning in *FINNROSE* applies to this case and renders the forum selection clause unenforceable. For reasons set forth below, it is clear to us that COGSA does apply to a general average claim.

First, COGSA applies by its own terms. The act provides in part that "[n]othing in this Act shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average." 46 U.S.C. App. §1305. (emphasis added) Gilmore & Black in their well-known *Law of Admiralty* conclude that "the word 'lawful' undoubtedly has some force." Gilmore & Black at 268. They suggest that COGSA prevents carriers from expanding their right to general average beyond their immunity under COGSA from cargo damage actions by shippers. Gilmore & Black at 268.

Finally, this circuit has expressly held that "general average concepts ... have been made subject to the Carriage of Goods by Sea Act ..." *Orient Mid-East Lines, Inc. v. A Shipment of Rice onboard S/S ORIENT TRANSPORTER*, 496 F.2d 1032, 1035 (5th Cir. 1974). *See also Louis Dreyfus Corp. v. 27,946 Long Tons of Corn*, 830 F.2d 1321, 1330 (5th Cir. 1987).

The forum selection clause that requires the parties to the bill of lading issued in this case to litigate their disputes in The People's Republic of China favors carriers. It tends to lessen the carrier's liability. *See FINNROSE*, 826 F.2d at 1443-44; Gilmore & Black at 268. This violates COGSA. Just as carriers may not enforce a forum selection clause in a cargo damage case that requires litigation in a foreign forum, they may not enforce such a clause in a controversy relating to general average.

For reasons advanced above, the judgment of the district court is reversed and the case is remanded for further proceedings.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

HUGHES DRILLING FLUIDS	*	CIVIL ACTION
VERSUS	*	NO. 86-1844
M/V LUO FU SHAN, ETC.	*	SECTION:"E"(2)

§§§§§§§§§§§§

MEMORANDUM OPINION AND ORDER

This matter is before the Court on motion for summary judgment of defendant Guangzhou Maritime Transport Bureau of China ("Guangzhou"). It is the position of Guangzhou that this general average dispute is subject to the choice of forum clauses in the pertinent bills of lading. Guangzhou urges the Court to enforce these clauses and decline to exercise jurisdiction. We find merit in Guangzhou's argument.

Preliminarily, we note that summary judgment is an appropriate procedural vehicle to assess the enforceability of a forum selection clause. *Grissom v. Colotti*, 644 F.Supp. 903, 904 (D. Puerto Rico 1986).

It appears that the bills of lading at issue provide: "All disputes arising under or in connection with this bill of lading shall be determined by Chinese law in the courts of or by arbitration in the People's

Republic of China." R.D. 9, Exhibit B (erroneously marked "Exhibit A" in the record), at 5, clause 2. The document further specifies: "General Average shall be adjusted in Beijing in accordance with China Council for the Promotion of International Trade Provisional Rules for General Average Adjustment, 1975." *Id.* clause 24. There is no factual dispute about the existence or content of these provisions.

Of course, the Supreme Court has held, precisely in the context of an international admiralty dispute, that forum selection clauses must be strictly enforced, unless the opponent of enforcement can meet the weighty burden of showing that the agreement was affected by fraud, undue influence, overweening bargaining power, or that it violates public policy. *M/V Breman v. Zapata Offshore Co.*, 407 U.S. 1, 11-15, 92 S.Ct. 1907, 1913-15, 32 L.Ed.2d 513 (1972).

Plaintiff Hughes Drilling Fluids opposes the enforcement of the forum selection clause: (1) because China is an inconvenient forum; (2) because the surveyors hired by Hughes were denied access to the M/V Luo Fu Shan when it returned to China to be repaired; (3) because Chinese law alone cannot resolve this dispute inasmuch as (a) the bill of lading stipulates, in clause 27, the applicability of COGSA to goods carried to or from the United States, (b) China has no jurisdiction over Hughes or its insurer, (c) the bill of lading in clause 24 does not provide that Chinese law will govern the question of liability for general average, but only the adjustment thereof.

We observe that plaintiff does not even allege, let alone demonstrate, the existence of factors contemplated by *Bremen* as sufficient to warrant a court's refusal to enforce a choice of forum clause. We reject plaintiff's arguments that we have sketched

above: (1) because far from establishing China as an inconvenient forum, the balancing of public and private interests necessary to determine *forum non conveniens* questions weighs in favor of a Chinese forum, *See Schexnayder v. McDermott International, Inc.*, ___ F.2d __ (5th Cir. Slip Op. May 29, 1987); *See Also Pacific Emp. Ins. Co. v. M/V Capt. W.V. Cargill*, 751 F.2d 801, 804-06 (5th Cir. 1985); (2) because we note that plaintiff's surveyors' alleged inability to examine the ship before its repairs is precisely the sort of dispute arising out of the adjustment of general average which the bill of lading doubly subjects to Chinese jurisdiction, under clauses 2 and 24, an that in any case it does not constitute fraud or overweening bargaining power affecting the agreement itself and its choice of forum clauses, *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 2457 n.14, 41L.Ed.2d 270 (1974); (3) because Chinese courts, according to the exhibits submitted by plaintiff and defendants, honor and apply any contractual choice of law provisions between litigants (such as Clause 27's stipulation of COGSA, so that whereas Chinese law governs the adjustment of general average, under the bill of lading it is expressly contemplated that Chinese courts will apply COGSA where pertinent, as for example, to the question of liability for general average); further because Chinese jurisdiction has been acceded to by plaintiff by virtue of clause 2. Plaintiff's other arguments are egregiously unmeritorious.

For these reasons, we decline to exercise jurisdiction herein and instead give force to the forum selection clauses in the bill of lading, which make it unnecessary for us to reach defendant's alternative argument that Louisiana is an inconvenient forum.

Accordingly, the motion of Guangzhou for summary judgment should be, and the same is hereby GRANTED dismissing plaintiff's suit at plaintiff's cost.

New Orleans, Louisiana, this 17th day of June, 1987.

/s/ Marcel Livaudais, Jr.
UNITED STATES DISTRICT JUDGE